FILE COPY

Office - Supreme Court, U. S.
DEC 5 1938
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938

No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, and SCHENLEY DISTRIBUTORS, INC.,

Appellants,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 253

BEN BURK, INC.,

Appellant,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 254

JOSEPH E. SEAGRAM & SONS, INCORPORATED, and SEAGRAM-DISTILLERS CORPORATION,

Appellants,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 255

HINRICHS DISTILLED PRODUCTS,

Appellant,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 256

ARROW DISTILLERIES, INC.,

Appellant,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

APPELLEES' BRIEF

ROY McKITTRICK,
Attorney General of Missouri,
EDWARD H. MILLER,
Assistant Attorney General
of Missouri,
Counsel for Appellees.

SUBJECT INDEX

	Page
SUMMARY OF ARGUMENT	2
ARGUMENT	2
POINT I:	
Under the decision of this Court in State Board of Equalization of California v. Young's Market Company, the Commerce Clause cannot invalidate a state liquor law	2
POINT II:	
Apart from the decisions of this Court in State Board of Equalization of California v. Young's Market Company and Mahoney v. Joseph Triner Corporation, the Missouri Statute is not subject to attack under the Commerce Clause	6
I. It is not certain that the Missouri Statute would, apart from the Twenty-first Amendment, violate the Commerce Clause if the Webb-Kenyon Act were in effect	7
A. The alleged unwarranted discriminations	7
B. Limitations on the police power	9
C. Efforts to exempt intoxicating liquor from protection of Commerce Clause and the result thereof	16
II. The Twenty-first Amendment removed all doubt of the validity of the Missouri Statute against an attack based on the Commerce Clause	16
A. The language of the Twenty-first Amendment	17
B. The purpose of the Twenty-first Amendment	18
1. Antecedent Evils—Origin of Language of section 2	18
2. Submission by the Congress	20
3. Public Opinion and Ratification	22
4. Action of Congress subsequent to Twenty-first Amendment	22
CONCLUSION	23

TABLE OF AUTHORITIES CITED

1. CASES: Page

Baldwin v. Seelig, 294 U. S. 511 (1934) 9
Barbier v. Connolly, 113 U. S. 27 (1885) 10
City Bank Farmers' Trust Co. v. New York Central Railroad Co., 253 N. Y. 49, 170 N. E. 489 (1930) 14
Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311 (1917) 6, 13
Collins v. Yosemite Park & Curry Co., 82 L. ed. (Advance Sheets) p. 1009 (1938) 3, 5, 23
German Alliance Insurance Co. v. Lewis, 233 U. S. 389 (1914) 13
Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412 (1937) 11
Hendrick v. Maryland, 235 U. S. 610 (1915) 14
Kane v. New Jersey, 242 U. S. 160 (1916) 14
Kentucky Whip & Collar Co. v. Illinois Central Railroad Co., 299 U. S. 334 (1937) 10, 12, 18
LaTourette v. McMaster, 248 U. S. 465 (1919) 16
Mahoney v. Joseph Triner Corp., 304 U. S. 401 (1938) ..... 3 et al.
McCormick & Co. v. Brown, 286 U. S. 131 (1932) 7
Mette v. McGuckin, 149 U. S. 781 (1892), affirming 18 Neb. 323, 25 N. W. 338 (1885) 16
Philadelphia Fire Association v. New York, 119 U. S. 110 (1885) 13, 14
Premier-Pabst Sales Corp. v. Grosstup, 298 U. S. 226 (1936) 16
Rippey v. Texas, 193 U. S. 504 (1904) 14
State Board of Equalization of California v. Young's Market Co., 299 U. S. 58 (1936) ..... 2 et al.
United States v. Hill, 248 U. S. 420 (1919) 22
Vance v. Vandercook Co., 170 U. S. 438 (1898) 7
Whitfield v. Ohio, 297 U. S. 431 (1936) 10, 12

2. CONSTITUTION OF THE UNITED STATES:

Commerce Clause, Article 1, Section 8, clause 3 ..... 2 et al.
Fourteenth Amendment, Section 1 2
Eighteenth Amendment 2, 7, 21
Twenty-first Amendment, Section 2 ..... 2 et al.

3. STATUTES:

Wilson Act, 26 Stat. at L. 313, chap. 728, 27 U. S. C. A. § 121 ..... 7, 14, 18, 19
Webb-Kenyon Act, 37 Stat. at L. 699, chap. 90, 27 U. S. C. A., § 122 ..... 2 et al.
Reed Amendment, 39 Stat. at L. 1069, chap. 162, as amended, 18 U. S. C. A., § 341 ..... 14, 22
Hawes-Cooper Act, 45 Stat. at L. 1084, chap. 79, 49 U. S. C. A., § 65 18
Ashurst-Sumners Act, 49 Stat. at L. 494, chap. 412, 49 U. S. C. A., §§ 61, 62 ..... 10, 14, 18
Federal Alcohol Administration Act, 49 Stat. at L. 977, chap. 814, 27 U. S. C. A., §§ 201-212 22
Missouri Liquor Control Act 17
Laws of Missouri, 1933-1934, Extra Session, pp. 77-97.
Laws of Missouri, 1935, pp. 267-285.
Laws of Missouri, 1937, pp. 527-534.
Missouri Anti-Discrimination Act, Laws of Missouri, 1937, pp. 536-543 ..... 2 et al.

4. MISCELLANEOUS:

Edward G. Whitney, Commercial Retaliation between the States, 19 American Law Review 62 (1885) 3
Note, 36 Central Law Journal 5 (1893) 13
Annotation, 91 American Law Reports 795 13

Supreme Court of the United States

OCTOBER TERM, 1938

No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, and SCHENLEY DISTRIBUTORS, INC.,

Appellants,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 253

BEN BURK, INC.,

Appellant,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 254

JOSEPH E. SEAGRAM & SONS, INCORPORATED, and SEAGRAM-DISTILLERS CORPORATION,

Appellants,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 255.

HINRICHS DISTILLED PRODUCTS,

Appellant,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 256

ARROW DISTILLERIES, INC.,

Appellant,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DIVISION OF THE WESTERN JUDICIAL DISTRICT OF MISSOURI

APPELLEES' BRIEF

SUMMARY OF ARGUMENT.

I.

In view of the decisions of this Court that a state may impose a discriminatory import duty on intoxicating liquor manufactured outside its borders without violating the Commerce Clause, and that the reasonableness of a state liquor law will not be reviewed by this Court because of the elimination by the Twenty-first Amendment of previously existing constitutional guarantees, the question presented in this case is not an open one, unless those cases are to be reconsidered.

II.

Even apart from those decisions, the Missouri Anti-Discrimination Act is a reasonable exercise of the police power as a measure of economic self-defense. This Court has sanctioned so-called retaliatory laws, and nothing in the language or historical background of the Twenty-first Amendment confines its operation to the protection of so-called "dry" states, or to an effect co-extensive with that of the Webb-Kenyon Act, although no decision of this Court has even so confined the operation of the Webb-Kenyon Act.

ARGUMENT.

I.

Under the Decision of this Court in State Board of Equalization of California v. Young's Market Company, the Commerce Clause Cannot Invalidate a State Liquor Law.

The effect of the Twenty-first Amendment to the Constitution of the United States on the Commerce Clause is the only constitutional issue in this case. No other part of the Constitution, including the Fourteenth Amendment, is mentioned in the brief of appellants.[1] They say the question is if the Twenty-first Amendment repealed the Commerce Clause as far as intoxicating liquor is concerned, or, in other words,

[1]Except the Eighteenth Amendment.

whether intoxicating liquor is in the same situation as it was before the adoption of the Constitution. Presumably they mean a repeal of the Commerce Clause as a means of attacking the validity of a state liquor law, for that is the only case before the Court. With this qualification, appellees are content to have the issue so framed.

The appellants' argument is that the legislative and judicial history of federal liquor regulation prior to the ratification of the Twenty-first Amendment, and the language of the Amendment, demonstrate that it does not wholly withdraw liquor from the protection of the Commerce Clause, and that that it would be contrary to our form of government and the policy of our Constitution to allow any state to erect tariff or prohibitory walls against liquor from other states, with a motive of selfish economic advantage or retaliation.

Manifestly, this position is contrary to the only decisions of this Court construing the Twenty-first Amendment, *State Board of Equalization of California* v. *Young's Market Company*, 299 U. S. 58 (1936), and *Mahoney* v. *Joseph Triner Corporation*, 304 U. S. 401 (1938). See also *Collins* v. *Yosemite Park & Curry Co.*, 82 L. ed. (Advance Sheets), p. 1009 (1938).

Of the language and the importance of the historical background of the Twenty-first Amendment this Court said in the *Triner* case, quoting from the *Young's Market* case:

> " 'The plaintiffs argue that limitation of the broad language of the Twenty-first Amendment is sanctioned by its history; and by the decisions of this Court on the Wilson Act, the Webb-Kenyon Act and the Reed amendment. As we think the language of the Amendment is clear, we do not discuss these matters'." 304 U. S. 404.

Unless this Court is prepared to reconside that language, 29 pages[2] in appellants' brief, devoted to historical background, will be disregarded.

---

[2](pp. 21-27; 33-54).

Appellants' points are these: I "*Apart from the Twenty-first Amendment, the Missouri Retaliation Statute here involved violates the Commerce Clause of the Federal Constitution*". This conclusion is unexceptionable. Of the statute considered in the *Young's Market* case, which imposed a discriminatory license fee on the privilege of importing beer, Mr. Justice Brandeis said:

> "Prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege." 299 U. S. 62.

But the reason offered by appellants for this conclusion, that the Missouri statute would be unconstitutional because it prohibits importation of liquor from some states, while allowing importation from others, is not so clear. Absent the Twenty-first Amendment the reason is superfluous, because discrimination would not be needed to damn a direct burden on interstate commerce. Under the Amendment, the discrimination has judicial sanction in the *Triner* case:

> "We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market Co.* Case, p. 62, 'involve not a construction of the Amendment, but a rewriting of it'." 304 U. S. 404.

Appellants' Point II is that "*The Missouri Retaliation Act involved in these cases is not saved by the Twenty-first Amendment. Nothing contained in that Amendment validates such a statute as this nor gives to the States unlimited power to burden interstate commerce in intoxicating liquors.*" If this contention is not answered by the holding in the *Young's Market* case that a discriminatory state import duty on beer is permissible under the Commerce Clause, it is certainly answered by the statement in the *Triner* case embodied in the last quotation above. And can something be left of the Commerce Clause as a

weapon for attack on state liquor laws, when the Amendment has been declared wholly to repeal the equal protection clause as to liquor, especially when the Amendment specifically relates to transportation and importation, and does not mention equality? As said in the *Triner* case:

> "The state officials insist that the provision of the statute is a reasonable regulation of the liquor traffic; and also, that since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor. As we are of opinion that the latter contention is sound, we shall not discuss whether the statutory provision is a reasonable regulation of the liquor traffic." 304 U. S. 403.

No serious attempt is made by appellants to distinguish the case at bar from the *Young's Market* and *Triner* cases. A few phrases from those cases are quoted, but no serious effort made to analyze, apply or refuse the logic of the opinions. Almost to ignore two such recent decisions of this Court, both obviously in point, which are the only two decisions of this Court on the subject,[3] is so unusual as to suggest that appellants' brief is, in effect, a *de facto* motion for a second rehearing of the *Young's Market* case.

The position of appellees is thus made difficult. If the Court considers the *Young's Market* and *Triner* cases closed, of what value is further argument by appellees, or indeed even the foregoing comments, for the *Triner* decision is scarcely six months old? On the other hand, as appellants' whole argument treats these two decisions as not final, should appellees burden this Court again with the substance of the briefs in those cases? Fortunately the Fourteenth Amendment is excluded from consideration, and appellants' attack narrowed to the Commerce Clause, so against the remote chance that the Court does desire to consider again the Commerce Clause construction, submitted and presumably finally settled in the *Young's Market* case, appellees will take up the argu-

[3]Except perhaps *Collins* v. *Yosemite Park & Curry Co.*, *supra*.

ments advanced by appellants, and attempt to meet appellants on the hypothetical basis of the non-existence of any final construction by this Court of the effect of the Twenty-first Amendment on the Commerce Clause.

II.

Apart from the Decisions of this Court in State Board of Equalization of California v. Young's Market Company and Mahoney v. Joseph Triner Corporation, the Missouri Statute is not Subject to Attack Under the Commerce Clause.

The remaining portion of appellees' argument will assume that this Court is prepared to reconsider its decision in the *Young's Market* case. Only on this assumption would it appear necessary for appellees to address any further argument to the Court. If this assumption is incorrect, the rest of this brief may be disregarded.

The balance of this argument will be subdivided into two points, answering, respectively, the two points in appellants' brief. Appellees' points, like appellants' points, will be designated by Roman numerals, and subdivided into the subdivisions of appellants' brief.

Before passing to appellants' Point I, a reference must be made to appellants' introductory "Scope of the Constitutional Issue" (pp. 7-10). Appellants say (p. 8) that the problem before the Court is still one of prohibition. This observation is not wholly accurate, or consistent with appellants' major proposition that state power over liquor is the same now as it was under the Webb-Kenyon Act, because unless this observation uses the term "prohibition" in the sense of absolute outlawry of liquor for beverage purposes, the ensuing argument is unsupported. Even under the Webb-Kenyon Act, prohibition was largely a question of degree in the several states. For example, in the case of *Clark Distilling Company v. Western Maryland Railway Company*, 242 U. S. 311 (1917), the West Virginia law there considered was not a bone dry law, for under it individual use of liquor was permitted. The Court in that case said:

"* * * the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor." 242 U. S. 323.

Thus the protection of the Webb-Kenyon Act was not confined to the laws of states which outlawed liquor for beverage purposes. Certainly the Wilson Act was not so confined. *Vance* v. *Vandercook Co.*, 170 U. S. 438 (1898). And if the terminology of "dry" and "wet" states is used, instead of the terminology of "prohibition", and if a "dry" state be defined as a state which at least restricts intoxicating liquor to non-beverage purposes, which is the sense in which " 'dry' state" is normally understood, the Wilson Act and the Webb-Kenyon Act were no more confined to the protection of "dry" states than they were confined to "prohibition" states.

The problem, therefore, is not one of absolute prohibition, but of regulation; that is, of the varying kinds of acts involving liquor which are subject to state prohibitions. Some prohibitions, such as selling liquor without a license, are nation-wide. It cannot be asserted that the Twenty-first Amendment or the Webb-Kenyon Act would not apply to that kind of a prohibition. Even under the Eighteenth Amendment, medicinal prescriptions of liquor were not prohibited. *McCormick & Co.* v. *Brown*, 286 U. S. 131 (1932).

I. It is not certain that the Missouri Statute would, apart from the Twenty-first Amendment, violate the Commerce Clause, if the Webb-Kenyon Act were in effect.

A. *The Alleged Unwarranted Discriminations.*

Appellants open their argument with an attack on the merits and the motive of the Missouri Law. They ask this Court to consider the question of its reasonableness, and of whether a state may, under its police power, enact this kind of a law, taking into account the purpose which the state seeks to accomplish thereby.

Appellants' brief attempts to convey the impression that the Missouri Anti-Discrimination Act is a harsh statute, conceived as an instrumentality of oppression, without any legitimate motive. Since so much history is digested in appellants' brief, the Court may want to know the historical background of the Missouri Act.

After the repeal of the Eighteenth Amendment, the several states which desired to legalize the liquor traffic were faced with the necessity of formulating completely new schemes of liquor laws. Some of the states, like Missouri, made no attempt to single out liquor manufactured in other states for discrimination, but some states did enact statutes calculated to foster domestic industry at the expense of the liquor industry of their sister states. Among this latter group were all the states where the appellants in these cases manufacture their products. For example, California undertook to impose a five hundred dollar license fee for the privilege of importing beer, *State Board of Equalization* v. *Young's Market Co., supra,* Indiana undertook to impose a fifteen hundred dollar fee for a port of entry permit (R. 22), and Pennsylvania to impose a gallonage tax on liquor from other states which was higher *by one dollar per gallon* than its tax on Pennsylvania liquor (R. 28). These forms of discrimination are only illustrations. The numerous other discriminations in appellants' states against out-of-state liquor are set out in the petitions herein, incorporated in the certificates of the Attorney General of Missouri as to the laws of such states.

The validity of these protective tariff measures was almost immediately questioned in the courts, resulting in the numerous, varying lower court decisions collected in a footnote to the *Young's Market* case opinion. But no seal of approval which was regarded as final was placed on these kinds of measures until this Court handed down its decision in the *Young's Market* case on November 9, 1936.

After the decision in the *Young's Market* case, the State of Missouri was presented with a dilemma which really offered only two choices: First, to adopt for itself and the protection of its citizens and industries similar protective

tariff measures. But a choice of this alternative would not have mitigated but would rather have encouraged the retaliations of an interstate tariff war. The second alternative was to attempt, by all legitimate means at its command, to obtain a repeal of the hostile legislation in the states which had adopted protective tariffs, and this method was chosen by Missouri when in 1937, faced with a rising tide of discriminatory legislation in other states, its General Assembly enacted the Anti-Discrimination Act. This measure is calculated to induce the states which discriminate against Missouri products to remove those discriminations or run the risk of losing the industries located therein which will suffer by reason of Missouri's prohibition of their products,[4] while permitting free entrance and competition in Missouri to the products of states which, like Missouri, do not believe in protective tariffs as a proper barrier against interstate commerce. When and if Missouri can accomplish this purpose of removing these artificial interstate trade barriers, it will be unnecessary even to repeal the Act here attacked, under which free commerce can then flow to the same extent as if the statute had never been enacted. In other words, the Missouri Act is only, and only purports to be, a means to an end.

B. *Limitations on the Police Power.*

The police power argument of appellants centers around the case of *Baldwin* v. *Seelig*, 294 U. S. 511 (1934). This same case was the basis of the same extensive argument in the *Young's Market* case.[5]

What is the police power? Appellants argue that it traditionally means a power authorizing a law enacted to protect the health, morals or safety of the inhabitants of a

---

[4] The argument on page 17 of appellants' brief that the burden of the Missouri Act falls on persons outside the state, who are without legislative redress, and for this reason are entitled to special consideration, is fallacious. The only legislative action necessary to eliminate the treatment of which appellants complain is action by the legislatures of their own states.

[5] Appellees' Brief, pp. 66-71; Appellees' Petition for Rehearing, pp. 13-14.

state. Without the *Young's Market* and *Triner* cases, it is possible to refute this contention.

The older cases on police power confined it to laws to protect health, safety or morals. But there is an additional legitimate police power objective, recognized by several decisions of this Court, namely, the right of economic self-defense.

As early as *Barbier* v. *Connolly*, 113 U. S. 27, 31 (1885) Mr. Justice Field said, in speaking of the Fourteenth Amendment:

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, *and to legislate so as to increase the industries of the State*, develop its resources, and add to its wealth and prosperity." (Emphasis of Counsel.)

In the recent prison-made goods cases, *Whitfield* v. *Ohio*, 297 U. S. 431 (1936), and *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334 (1937), the same principle was recognized. Chief Justice Hughes, quoting in the latter case from the former, said that the Ohio legislation proceeded "upon the view 'that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison'" (299 U. S. 351), and held that Ohio, under the Ashurst-Sumners Act, could properly exclude convict-made goods coming from other states, harmless in themselves, and with the sole object of economic self-defense of its laboring citizens. The principle in those cases is no different from the principle asserted by the Missouri Act here questioned, and it is also noteworthy that this principle was sustained in the prison-made goods cases as to the regulation of commodities which were usual lawful commodities and over which the states could not attempt to exercise the augmented power that they have a right to exercise over alcoholic liquor.

Perhaps the last and most pertinent enunciation of this economic phase of the police power is contained in the Louisiana Chain Stores Tax case, *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1937), where the Court said:

"In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business, or regulate a business in such manner as to abate evils deemed to arise from its pursuit. Whatever a state may forbid or regulate it may permit upon condition that a fee be paid in return for the privilege, and such a fee may be exacted to discourage the prosecution of a business *or to adjust competitive or economic inequalities.* Taxation may be made the implement of the exercise of the state's police power; and proper and reasonable discrimination between classes *to promote fair competitive conditions and to equalize economic advantages* is therefore lawful." (Emphasis of Counsel.) 301 U. S. 425.

The Court further said:

"The claim is, essentially, that even if local evils flow from the appellant's methods the state cannot control those evils because its power is limited to conditions created by the members of the chain found within the state. The conclusion is that the state must treat these stores as if they were something different from what they really are, since to do otherwise would be to reach beyond the borders of Louisiana for the measure of the tax. The argument answers itself. The policy Louisiana is free to adopt with respect to the business activities of her own citizens she may apply to the citizens of other states who conduct the same business within her borders, *and this irrespective of whether the evils requiring regulation arise solely from operations in Louisiana or are in part the result of extra-state transactions.*" (Emphasis of Counsel.) 301 U. S. 427.

The effect of the foregoing argument is, it is submitted, to establish that the Missouri Act is justified under the police power, as the police power has been expanded by these cases to include the right to encourage home industry—the right of economic self-defense. Thus if this Court should decide to reconsider its decision in the *Young's Market* case as to the effect of the Twenty-first Amendment on the Commerce Clause, and to test the Missouri Act by a standard of reasonableness, it can be sustained as a police power measure.

Appellants argue that a discrimination between manufacturers of liquor in states having certain kinds of laws on the one hand, and manufacturers of liquor of equal quality and purity in states having other kinds of laws on the other, is an arbitrary and improper discrimination. They contend that the products of, for example, The Old Quaker Company, manufacturing in Indiana, may be of equal purity, price and volume with the products of a Maryland manufacturer, that they are no more harmful in the Missouri market than the Maryland products, and therefore that they cannot properly be excluded, and the Maryland products allowed to come in. Inherent harmfulness of a product is not the test of the right of a state to exclude it. Even though Missouri recognizes alcoholic liquor as a lawful commodity in commerce, this does not mean that Missouri cannot, under the Constitution, and even without the Twenty-first Amendment, exclude alcoholic liquor solely because of the conditions in the state of its manufacture. The two prison-made goods cases, *Whitfield* v. *Onio*, 297 U. S. 431 (1937), and *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334 (1937), which have been mentioned above, completely dispose of this argument. The latter squarely holds that conditions of manufacture in another state can justify the exclusion of an inherently harmless product, and that conditions of manufacture can act as a substitute equivalent for the inherent harmfulness of diseased or noxious articles.

If counsel for appellees correctly understand appellants' discrimination argument, it attacks the discrimination under the Missouri law on the sole ground that a discrimination

cannot properly be made by the State of Missouri which is based merely on the presence or absence, in the laws of other states, of certain kinds of provisions, especially if its motive is selfish economic advantage or retaliation. The selfish economic motive argument has just been answered. What, then, if the motive is retaliation?

In the case of *Philadelphia Fire Association* v. *New York*, 119 U. S. 110 (1886), this Court considered and upheld a so-called retaliatory state law. It has been over fifty years since that case was decided, and although retaliatory insurance laws are in force in many states, counsel for appellees have been unable to find any subsequent attempt to persuade this Court to abandon or modify that decision. In an annotation in 19 American Law Reports 795, state court decisions dealing with so-called retaliatory laws are collected, and apparently only in the State of Alabama has such a law been declared invalid. The validity of this principle of legislation has evidently been assumed for many years, as the dates of most of the cases cited in the above annotation will testify. Nor has the subject aroused the interest of legal scholars since the turn of the century. The most recent articles discovered are Edward G. Whitney, Commercial Retaliation between the States, 19 American Law Review 62 (1885), and a note in 36 Central Law Journal 5 (1893).

It is particularly interesting to observe that the retaliatory laws have been almost exclusively insurance laws. This Court did not declare the insurance business to be one affected with a public interest so as to be subject to the kind of state regulation to which businesses so charged are susceptible until its decision in *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389 (1914), so that the Court was, in *Philadelphia Fire Association* v. *New York*, dealing with a statute regulating what it then considered a private business. Certainly a retaliatory liquor statute presents a stronger case of validity than that case then presented. At the risk of wearisome repetition, reference is made to such cases as *Clark Distilling Company* v. *Western Maryland Railway Company*, 242 U. S. 311, 332 (1917), where the Court referred to "the enlarged

right" of the states to regulate liquor, and said that "the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest", and *Rippey v. Texas*, 193 U. S. 504, 510 (1904), in which the Court, speaking of the liquor business, said that "the State has absolute power over the subject * * *. It may favor prohibition to just such degree as it chooses."

Classifications based on a difference in the laws of other states have been upheld in numerous instances. In addition to the *Philadelphia Fire Association* case, reference is made to the automobile license cases, *Hendrick* v. *Maryland*, 235 U. S. 610 (1915), and *Kane* v. *New Jersey*, 242 U. S. 160 (1916); the reciprocity provisions in inheritance tax laws which have been upheld by numerous state courts, illustrative of which is the opinion by Chief Judge Cardozo in *City Bank Farmers' Trust Co.* v. *New York Central Railroad Co.*, 253 N. Y. 49, 170 N. E. 489 (1930); this Court's decisions sustaining Congressional liquor legislation such as the Wilson Act, the Webb-Kenyon Act, and the Reed Amendment, and more recently the *Kentucky Whip & Collar* case sustaining the validity of the Ashurst-Sumners Law, which is in almost the identical language of the Webb-Kenyon Act.

The Court is invited to compare the motive of the Missouri Act with the motive of the California Act sustained in the *Young's Market* case, because if California can exclude foreign liquors of all states for no reason except to raise revenue (which is certainly not an argument to support the validity of a law against an attack based on the commerce clause), surely Missouri can also exclude the liquor of some states for a motive which is obvious, and to promote one of the chief original aims of the Constitution of the United States, namely, free commerce among the states.

Appellants stand behind the tariff walls of their respective states, asserting that the tariffs enacted by those states to favor their products and to oppress Missouri products are valid and perfectly proper, and then ask this Court to prevent Missouri from taking the only step open to her to attempt to obtain a free market and fair treatment in those states. They

attempt to justify this position by saying that Missouri cannot penalize the products of a state because that state does something which the *Young's Market* case held it may legally do. The other state's law is valid for the very reason that this Court has said that a state may treat foreign liquor in any way it wants, and for appellants to say that the fact that Pennsylvania or Indiana or Massachusetts can do what they want to Missouri liquor, proves that Missouri cannot do what it wants with their liquor, is, in effect, an assertion that things equal to the same thing are not equal to each other.

It is suggested that the Missouri Act is invalid because extra-territorial in its operation, and that the General Assembly of Missouri has no right to concern itself with the regulatory liquor laws of other states, because this is the problem and concern of those other states, free from interference by Missouri.

The State of Missouri makes no attempt by this Act to regulate or interfere with the liquor laws of other states which are enacted to protect the health, safety and morals of the inhabitants of those states, nor does it make any effort to interfere with or induce a change of the revenue or commercial liquor laws of those states, unless and until those states enact strictly commercial liquor laws designed to prevent Missouri products from being introduced into those states, or competing there in the open market. In other words, the Missouri Act only goes into operation when another state enacts a measure not to protect the health, morals or safety of its citizens and which, if it is for the purpose of raising revenue, singles out Missouri products for unfair discriminations. If the other state has a right to enact this kind of a measure, with the sole object of putting the products of Missouri labor at a commercial disadvantage there, then surely Missouri must have the right to interest herself in this law and to attempt, by all the legitimate means in her power, to induce the repeal of that law. When such a law is enacted it is not true to say that such a law is the concern of the state enacting it alone. Such a law is directed at the State of Missouri, and Missouri has the right to protect herself accordingly. Also, if a Pennsylvania law regulating Missouri liquor is solely the concern of Pennsyl-

vania, and if Missouri has nothing to say about it, then what right has a citizen of Pennsylvania, a foreign corporation not licensed to do business in Missouri, like one of the appellants,[6] to concern itself and interfere with the regulatory laws which Missouri may enact as to Pennsylvania liquor? Even before the Twenty-first Amendment, the State of Missouri could have absolutely refused to license any non-resident to sell liquor. *Mette* v. *McGuckin*, 149 U. S. 781 (1892), affirming 18 Neb. 323, 25 N. W. 338 (1885). See *LaTourette* v. *McMaster*, 248 U. S. 465 (1919). And so *a fortiori* after the Twenty-first Amendment. *Premier-Pabst Sales Corp.* v. *Grosscup*, 298 U. S. 226 (1936).

C. *Efforts to exempt intoxicating liquor from protection of Commerce Clause and the result thereof.*

After extracting the police power argument from appellants' points IB and IC, there remains a historical resumé of eighty-four years of federal liquor litigation and legislation. The same thesis is amplified by appellants' Point IIB, and deals with a hypothetical situation, the non-existence of the Twenty-first Amendment. Further consideration thereof will be deferred, as will its answer, until appellants' Point IIB is reached.

II.

The Twenty-first Amendment removes all doubt of the validity of the Missouri Statute against an attack based on the Commerce Clause.

The thesis of appellants' point II is that the Twenty-first Amendment does not remove the Commerce Clause *in toto* as a limitation on state power over intoxicating liquor, and that affirmatively, the Twenty-first Amendment is coextensive in effect, and means the same thing as, the Webb-Kenyon Act

---

[6] None of the appellants except those in Cases Numbers 255 and 256 are admitted to do business in Missouri as corporations (R. 37, a similar allegation being in the petitions in 253 and 254).

(p. 29). They place their principal reliance on the supposed identity of purpose between the Amendment and the Webb-Kenyon Act.

A. *The Language of the Twenty-first Amendment.*

Small satisfaction is obtainable by appellants from the words of the Twenty-first Amendment. It is suggested that "delivery and use" are the pivotal words, and that it is not "transportation in violation of state laws" which is prohibited, (Mr. Justice Brandeis to the contrary in the *Triner* case, describing "the amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof.'" 304 U. S. 402), but rather "transportation for delivery or use in violation of state laws." Appellants insist that the words "delivery or use" must be given effect. Certainly this is correct. If the Amendment were confined to protecting only transportation in violation of state laws, it would be less adequate than the statutory law existing prior to its enactment. The emphasis of state regulatory laws is rarely on transportation. It is usually on sale and use.[7] Yet if the Amendment did not contain the words "transportation" and "importation", the Commerce Clause would strike down many state laws. This is an obvious reason for the incorporation of the words "transportation" and "importation" in the Amendment. Another is the fact that delivery and use, unrelated to transportation, are not traditionally national matters, but matters of internal concern to the several states. There was no necessity for the Amendment except to affect delivery and use insofar as they were related to interstate commerce and to the Fourteenth Amendment.

The language of the Amendment is awkward. It would have been less awkward, grammatically, if the phrase "of

[7] In the original post-repeal Missouri Liquor Control Act (Laws of Missouri, 1933-1934 Extra Session, pages 77-97), the word "transportation" appears only twice (Secs. 4, 41a). In the Amendments to the Act (Laws of Missouri, 1935, pages 267-285; Laws of Missouri, 1937, pages 527-534) its presence appears to be for the purpose of perfecting the criminal provisions of the Act.

intoxicating liquors" were transplanted from its present position and placed after the word "importation", so that section 2 would read:

> "The transportation or importation of intoxicating liquors into any State, Territory, or possession of the United States for delivery or use therein in violation of the laws thereof is hereby prohibited."

If the Amendment were so rephrased, an argument might be made that the intent was to prohibit only delivery or use in violation of state law, as those phrases would then be contiguous, unseparated by punctuation. However, even then surely "transportation or importation" would be the subject of the sentence. Their separation, even at the cost of grammatical ineptitude, indicates, if the language needs construction at all, an intent to avoid that construction. How can appellants say that it is "the laws of a State with regard to delivery and use which are in the contemplation of the Amendment"? Can "transportation or importation" be ignored under any rule of construction? And if these words "delivery" and "use" have, as suggested, acquired a meaning in the long struggle over prohibition, where is there any justification for a meaning which is not their normal, natural meaning?

B. *The Purpose of the Twenty-first Amendment.*

1. *Antecedent evils—origin of language of Section 2.*

It is said that "delivery" alone was the specific evil dealt with by the Webb-Kenyon Act. The Wilson Act did have a defect, and delivery was the defect, so it was corrected by the Webb-Kenyon Act.[8] No resurrected problem of delivery alone was disturbing the Congress when it considered the Twenty-first Amendment. That had been corrected by the Congress twenty years before.

---

[8]Just as the same defect in the Hawes-Cooper Act, 45 Stat. at L. 1084, chap. 79, 49 U. S. C. A. § 65, was corrected by the Ashurst-Sumners Act, 49 Stat. at L. 1084, chap. 412, 49 U. S. C. A. §§ 61, 62. *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co. supra.*

Much stress is laid on the word "divest". A historical description of the origin and use of this word in liquor legislation and decisions ends thus:

> "In such fashion was the theory of the Wilson Act, crystalized in the word 'divest' in the *Rahrer Case*, carried over via the title into the Webb-Kenyon Act and sustained by the Court." (App. Br. p. 38).

Numerous readings of the argument surrounding the importance of the word "divest"; the fact that the Wilson Act was declaratory, the Webb-Kenyon Act prohibitory, but both reached the same result, although the second section of the bill which became the Webb-Kenyon Act was expunged; and that the Twenty-first Amendment also is prohibitory, have failed to vitalize it for counsel for appellees. If the Wilson Act and the Webb-Kenyon Act were different degrees of the exertion of an identical power (App. Br. p. 37 n.), so that they would have had the same effect whether phrased as they were, or whether both were phrased as prohibitions, or both as declarations, no significance is observed in the fact that they were phrased as they were. The same reasoning applies to the change of title of the Webb-Kenyon Act from "An act to prohibit * * * *" to "An act to divest * * *". The Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment are all unambiguous.

It may be of some significance that the Wilson Act requires equality of treatment of imported liquor by its very terms, and that the Webb-Kenyon Act does not. If there were any adjudication that the Webb-Kenyon Act did require equality of treatment by implication, even in the absence of specific language, it might be important. Such a construction of an Act of Congress which admittedly is similar in language to the Twenty-first Amendment, would, before the decisions in the *Young's Market* and *Triner* cases, have offered an argument that discrimination against imported liquor is not permitted under the Amendment. But the research of counsel has disclosed no such case, and the argument

of similarity, predicated on the assumption that no discrimination by a partially wet state against imported liquor was permissible under the Webb-Kenyon Act, is revealed as illusory. And if there is any significance in the legislative history of the Webb-Kenyon Act, it would appear to be in the fact that the second section of the bill as offered specifically required equality of treatment of imported liquor, in language like that of the Wilson Act, and that this section was expunged before the bill became a law.

Appellants conclude their Point IIB1, which brings the historical argument up to the Congressional debates on the Twenty-first Amendment, by saying:

> "The Aim of the Webb-Kenyon Act was to put 'dry' states in a position to deal with all phases of the liquor problem that could arise in a State committed to a policy of prohibition." (p. 41).

Counsel for appellees have carefully compared this entire historical argument with the arguments in the briefs of the parties in the *Young's Market* and *Triner* cases.[9] Apart from the arguments drawn from the supposed importance of the words "delivery" and "use", and the significance attributed by appellants herein to the development of the "divesting" quality of the Federal enactments, nothing has been discovered in appellants' treatment of the historical prelude to the Twenty-first Amendment's submission to the states which was not fully presented to the Court by counsel in those two preceding cases.

2. *Submission by the Congress.*

Pursuing the line of thought embodied in the concluding paragraph of their Point IIB1, quoted above, appellants say that the sole question which Congress intended to submit to the states by section 2 of the Twenty-first Amendment was

---

[9] *State Board of Equalization* v. *Young's Market Co.*, Appellees' Brief, pp. 26-52; Appellant's Brief, pp. 29-40; *Mahoney* v. *Joseph Triner Corp.*, Appellant's Brief, pp. 11-29; Appellee's Brief, pp. 4-8.

"whether those states which wished to remain 'dry' after the repeal of the Eighteenth Amendment should be protected, in their desire by a permanent constitutional provision" (p. 42). Appellants say that no issue was raised in Congress on the protection, if any, which was to be granted by the Amendment to "wet" states against rival liquor from other "wet" states.

Probably it is true that the senators addressing themselves to the effect of the Twenty-first Amendment were motivated by a realization of the impermanence of statutory national liquor legislation, and by the possible unconstitutionality of such legislation. Probably it is also true that section 2 of the Twenty-first Amendment is shorter than the Webb-Kenyon Act because it is fitting that a constitutional amendment should not particularize.

Probably it is also true that the senators did not give much, if any, consideration to the effect of the Twenty-first Amendment in permitting state protective tariffs on liquor. They reviewed in their debates the decisions of this Court involving the validity of state liquor laws, but there was no decision of this Court or of any other court, so far as counsel has been able to ascertain, dealing with a state law which attempted, while the Webb-Kenyon Act was in force, to erect a protective tariff wall against out-of-state liquor. Yet this silence of the record cannot mean that the final form of the Twenty-first Amendment which they drafted, if unambiguous in its terms, is not to be given by this Court that unambiguous meaning.

If there is any significance in the shaping of the Twenty-first Amendment by the Senate, it would seem to rest on the fact that the original resolution prohibited the introduction of liquor into any state "if the laws in force therein *prohibited* such transportation or importation", whereas the final form of the amendment is not so qualified. (App. Br. p. 46.) The same significance might be attributed to Senator Glass's substitute resolution, which was likewise qualified, and which failed of passage. *Id.* These facts, presenting as they do two alternatives of which one was rejected, speak more plainly than the failure of Senators Blaine and Glass to point

out how their resolutions differed from the form which was adopted.

The importance of this rejection is emphasized by the fact that the Reed Amendment, approved March 3, 1917,[10] the last legislative step before National Prohibition, only applied to states which "prohibit" intoxicating liquor for beverage purposes. Congress, in framing the Twenty-first Amendment, passed over this more recent Act, rejecting language which would have confined the operation of the Twenty-first Amendment to "dry" states. See *United States* v. *Hill*, 248 U. S. 420 (1919).

3. *Public Opinion and Ratification.*

Admittedly the material presented by appellants under this point has not been presented to this Court before. However, appellants fairly admit that the record of ratification furnishes little aid in construing the effect of section 2 of the Amendment on the Commerce Clause. Truly the sentiment throughout the nation, as represented in the conventions, was a repeal sentiment. Undoubtedly that thought predominated in the minds of the electors. It is not supposed that appellants contend that because the text of section 2 was not on the ballots in every state, there was not a proper submission of the Amendment to the conventions so as to invalidate its ratification. And if it was validly ratified, it must have been ratified in the form in which submitted; which must be given its plain meaning. It is often that part of a contract or statute to which little attention was given by the parties that later is called into question.

4. *Action of Congress Subsequent to Twenty-first Amendment.*

Appellants argue that the present existence of federal liquor laws like the Federal Alcohol Administration Act,[11] proves that the Congress still has power under the Commerce Clause to regulate liquor. If appellees admit that the Federal

[10]39 Stat. at L. 1069, chap. 162, as amended, 18 U. S. C. A. § 341.

[11]August 29, 1935, 49 Stat. at L. 977, chap. 814, 27 U. S. C. A. §§ 201-212.

Alcohol Administration Act is referable to the Commerce Clause, and not to the taxing power, this admission cannot prejudice their position. Perhaps the Commerce Clause is being utilized by this federal legislation, but it only operates on liquor in interstate commerce up to the point where that liquor reaches the boundary of a state. In other words, the Twenty-first Amendment is only applicable to liquor transported *into* the state for delivery or use therein in violation of the laws thereof. As an example, if Indiana, Illinois and Missouri were "wet" states, and Kansas a "dry" state, and liquor were shipped from Indiana to a point of destination in Kansas, the Twenty-first Amendment would apply only to that part of the carriage beginning at the Kansas state line. Or suppose all existing state liquor laws were repealed, it is unnecessary to point out that the Congress then could, under the Commerce Clause, regulate the interstate liquor traffic.[12]

CONCLUSION.

It is respectfully submitted that this Court has before it nothing previously unconsidered and adjudicated; that the Missouri Act here challenged is a reasonable police power enactment; that even if it were not, the Twenty-first Amendment immunizes it from a Commerce Clause attack; that the lower court correctly dismissed the bills of complaint, and that its judgments should be affirmed.

---

[12] *Collins* v. *Yosemite Park & Curry Co.*, decided May 31, 1938, 82 L. ed. (Advance Sheets) 1009, holding that the United States, and not the State of California, may regulate intoxicating liquor in Yosemite Park, in which the Court said (p. 1020): "Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the Twenty-first Amendment is not applicable."

ROY MCKITTRICK,
Attorney General of Missouri,

EDWARD H. MILLER,
Assistant Attorney General of Missouri,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

Nos. 252, 253, 254, 255 and 256.—October Term, 1938.

252	Joseph S. Finch & Company, et al., *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al.	Appeals from the District Court of the United States for the Western District of Missouri.
253	Ben Burk, Inc., *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al.	
254	Joseph E. Seagram & Sons, Inc., et al., *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al.	
255	Hinrichs Distilled Products, *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al.	
256	Arrow Distilleries, Inc., *vs.* Roy McKittrick, Attorney General of the State of Missouri, et al.	

[January 3, 1939.]

Mr. Justice Brandeis delivered the opinion of the Court.

The State of Missouri approved April 8, 1937,[1] an Act, sometimes called the Missouri Anti-Discrimination Act, sometimes the Missouri Retaliation Act. It provides in Section 4:

"The transportation or importation into this state, or the purchase, sale, receipt or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined."

The statute defines what exactions, prohibitions and restrictions imposed by laws of the several states shall be deemed "discrimina-

[1] Laws of Missouri 1937, pp. 536-543.

tions" imposed upon the importation into the several states of alcoholic liquor manufactured in Missouri; requires the Attorney General to determine whether there exists therein any such discrimination; and, if he find any such discriminatory law, to specify the same in a certificate to be filed with the Supervisor of Liquor Control. The Supervisor is directed to publish notice of the certificates and to advise all licensees that it will be unlawful to import into Missouri or to purchase, receive, sell or possess in Missouri any liquor manufactured in a discriminating state. Pursuant to these provisions, the Attorney General filed, in October, 1937, certificates with the Supervisor declaring that the States of Indiana, Pennsylvania, Michigan and Massachusetts are "states in which discriminations existed" as defined by the Missouri statute.

To enjoin enforcement of this provision of the Missouri statute, these five suits were brought, in the federal court for the western district of the state, against the Attorney General and the Supervisor of Liquor Control. Each bill charges that the provision violates the commerce clause of the Federal Constitution and the equal protection clause of the Fourteenth Amendment.[2] In four of the cases the bill alleges that the plaintiff is a citizen of a state other than Missouri; that it manufactures liquor in one of the states certified as "discriminating"; that it holds a non-resident Missouri permit under which it imports and sells in Missouri a part of its products; and that it would be irreparably injured if the provision of the Missouri statutes were enforced. The fifth case differs only in that the bill alleges that the plaintiff is a citizen of Missouri engaged there in the rectifying and bottling business for which it imports liquor manufactured in a state certified as "discriminating." As both a temporary and a permanent injunction was sought in each case, each was assigned for hearing before a three-judge court. In each the defendants moved to dismiss the bill. Later, the cases were consolidated for hearing and review; and it was agreed that when the court heard the application for the temporary injunction it should finally determine the causes. The District Court denied the applications for a temporary and a permanent injunction and dismissed the bill in each case. 23 Fed. Supp. 244. But the temporary restraining orders issued upon the filing of the

[2] The bill also alleged that the provision violated the due process clause of the Fourteenth Amendment, the contract clause and the privileges and immunities clause.

bills were continued until the final determination of the appeals to this Court.

The claim of unconstitutionality is rested, in this Court, substantially on the contention that the statute violates the commerce clause.[3] It is urged that the Missouri law does not relate to protection of the health, safety and morality, or the promotion of their social welfare, but is merely an economic weapon of retaliation; and that, hence, the Twenty-first Amendment should not be interpreted as granting power to enact it. Since that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. As was said in *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62, "The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." To limit the power of the states as urged "would involve not a construction of the Amendment, but a rewriting of it." See also *Mahoney* v. *Jacob Triner Corporation*, 304 U. S. 401; *Indianapolis Brewing Co.* v. *Liquor Control Commission*, No. 130, decided this day.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[3] The arguments in appellant's brief are confined to the commerce clause. The statement of points to be relied upon includes all the contentions of the bill.